MOHD NOR RIZA MAT TAHAR

v.

PP

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
HELILIAH MOHD YUSOF JCA
KN SEGARA JCA
[CRIMINAL APPEAL NO: N-05-14-07]
11 SEPTEMBER 2008

CRIMINAL LAW: *Penal Code - Section 302 - Trial court failing to judiciously evaluate defence - Trial court failing to consider all evidence adduced - Trial court failing to draw inferences favourable to accused - No evidence of intention or knowledge to cause death - Whether conviction for murder unsafe - Whether appellate intervention warranted*

CRIMINAL PROCEDURE: *Appeal - Conviction and sentence against - Accused convicted for murder and sentenced to death - Trial court failing to judiciously evaluate defence - Trial court failing to consider all evidence adduced - Trial court failing to draw inferences favourable to accused - No evidence of intention or knowledge to cause death - Whether conviction for murder unsafe - Whether appellate intervention warranted*

EVIDENCE: *Judge - Failure to consider all evidence - Trial judge failing to critically analyze prosecution's evidence - Trial judge failing to evaluate defence of accused - Trial judge failing to draw inferences favourable to accused - Whether conviction imposed by trial judge unsafe - Whether appellate intervention warranted*

The accused was tried on a charge on murder in the High Court. In his defence, the accused alleged that he had no intention to kill the victim but had merely wanted to confront the victim at the suggestion of SP4 – a prosecution witness – so that the victim would stop defaming him. The prosecution however, contended that the accused had declared to SP4 that he wanted to kill the victim and soon thereafter, executed his intention by confronting the victim with a knife and stabbing him at a parking lot, without any quarrel having occurred between them. The post-mortem report on the victim revealed that the victim had indeed died from a stab wound to his chest. The report also revealed that the stab wound was directed downwards and to the right. Cross-examination of the pathologist (SP3) indicated that at the time the

A stab wound was inflicted, the knife was in a reverse position. The High Court convicted the accused and sentenced him to death. The accused appealed to the Court of Appeal.

Held (allowing the appeal and substituting the conviction for
B **murder with a conviction for culpable homicide not amounting to murder)**
Per KN Segara JCA delivering the judgment of the court:

(1) The conviction for murder was unsafe. The High Court judge had failed to evaluate judiciously, the accused's defence on
C oath that he had no intention to kill the deceased at any time. It is incumbent and elementary for a trial judge to give adequate judicial appreciation of the defence version to determine whether the defence has cast a reasonable doubt on
D the prosecution's case. The burden on the prosecution to prove its case beyond reasonable doubt at the conclusion of the trial, notwithstanding a *prima facie* case having been established at the close of the case for the prosecution, never shifts to the defence to establish innocence. A bare killing without proof of intention or knowledge to cause death can
E never be murder, punishable under s. 302 Penal Code. *Mat v. PP* (foll). (paras 3 & 23)

(2) The reverse position of the knife at the moment of the injury, and the direction of the wound, could give rise to several
F inferences favourable to the accused, in the context of the accused's version of the incident, particularly as to his credibility and probability that the fatal injury was inflicted unintentionally and unknown to the accused, in the course of a struggle by the accused to retrieve the knife taken away by
G the deceased victim from its tucked position, behind the accused's back. (para 13)

(3) The trial judge had not given adequate judicial appreciation and proper evaluation of the defence in stating that the
H defence had failed to raise any reasonable doubt, without assigning any valid reasons. The trial judge had misdirected himself in not adequately analyzing all of the evidence before him, at the close of the case for the defence. The trial judge relied heavily on the highly prejudicial and incriminating
I evidence of SP4 without considering other evidence. (paras 24, 25 & 26)

(4) The High Court judge failed to analyze the prosecution's evidence critically upon the conclusion of the case for the defence, particularly, the evidence of SP4, to satisfy himself that the prosecution had proved its case beyond reasonable doubt, in the light of the accused's version of the incident. The judge further failed to draw inferences favourable to the accused which, *ipso facto*, lent credibility to the accused's version and, cast serious doubt that the accused intended to kill the deceased. (para 27)

[Convicted for culpable homicide not amounting to murder. Sentenced to ten years imprisonment.]

Bahasa Malaysia *Translation Of Headnotes*

Tertuduh telah dibicara di Mahkamah Tinggi atas pertuduhan bunuh. Dalam pembelaannya, tertuduh mengatakan bahawa beliau tiada niat untuk membunuh mangsa tetapi hanya ingin bersemuka dengannya atas cadangan SP4 – seorang saksi pendakwaan – supaya mangsa berhenti memfitnahnya. Pendakwaan bagaimanapun mendakwa bahawa tertuduh telah menyuarakan kepada SP4 bahawa beliau ingin membunuh mangsa, dan telah mengotakan kata-katanya itu sejurus kemudian apabila dengan bersenjatakan sebilah pisau beliau bertemu mangsa di tempat parkir dan menikam mangsa tanpa berlaku apa-apa pergaduhan di antara mereka. Laporan bedah siasat mangsa menunjukkan bahawa kematian adalah disebabkan satu tikaman di dadanya. Laporan selanjutnya mendedahkan bahawa tikaman terarah ke bahagian bawah dan kanan. Pemeriksaan balas ahli patologi (SP3) menunjukkan bahawa semasa tikaman dibuat pisau adalah dalam keadaan terbalik. Mahkamah Tinggi telah mensabitkan tertuduh dan menjatuhkan hukuman mati terhadapnya. Tertuduh merayu ke Mahkamah Rayuan.

Diputuskan (membenarkan rayuan dan mengganti sabitan bunuh dengan sabitan mematikan orang tidak sampai membunuh)

Oleh KN Segara HMR menyampaikan penghakiman mahkamah:

(1) Sabitan atas kesalahan bunuh tidak selamat. Hakim Mahkamah Tinggi gagal menilai secara kehakiman pembelaan bersumpah tertuduh bahawa beliau tiada niat untuk membunuh simati pada bila-bila masa pun. Adalah menjadi tanggungjawab dan kewajipan asas seseorang hakim bicara untuk memberi penilaian

kehakiman secukupnya terhadap versi pembelaan dalam menentukan sama ada pembelaan telah membangkitkan keraguan munasabah terhadap kes pendakwaan. Beban atas pendakwaan untuk membuktikan kesnya di luar keraguan munasabah di akhir perbicaraan, walaupun suatu kes *prima facie* telah dibuktikan di akhir kes pendakwaan, tidak pernah berpindah kepada pembelaan untuk membuktikan ketidak-bersalahannya. Menyebabkan kematian semata-mata tanpa bukti niat untuk membunuh atau pengetahuan untuk menyebabkan kematian sekali-kali tidak boleh menjadi perbuatan bunuh yang boleh dihukum di bawah s. 302 Kanun Keseksaan (*Mat v. PP* (diikuti)).

(2) Kedudukan pisau yang terbalik semasa berlaku tikaman, serta kedudukan arah kecederaan yang dialami, boleh membangkitkan beberapa inferens bermanfaat kepada tertuduh, dalam konteks versi kejadian seperti yang dikemukakan tertuduh, terutama berhubung kredibiliti beliau serta kemungkinan bahawa kecederaan fatal itu berlaku tanpa sengaja dan tanpa disedari oleh tertuduh, iaitu semasa pergelutan di antara mereka bilamana tertuduh cuba merampas semula pisau yang diambil oleh simati dari kedudukannya yang terselit di belakang tertuduh.

(3) Yang arif hakim bicara gagal memberikan satu penilaian wajar dan pertimbangan kehakiman yang secukupnya terhadap pembelaan apabila mengatakan pembelaan gagal membangkitkan keraguan munasabah, tetapi tanpa memberikan sebarang sebab baginya. Hakim bicara telah tersalah arah akan dirinya kerana tidak menganalisa secukupnya semua keterangan yang ada di hadapannya di akhir kes pembelaan. Hakim bicara terlalu bergantung kepada keterangan SP4 yang sangat prejudis dan sangat menunjukkan bersalah tanpa menimbang keterangan-keterangan lain.

(4) Hakim Mahkamah Tinggi gagal menganalisa keterangan pendakwaan secara kritikal di akhir kes pembelaan, terutama keterangan SP4, bagi memuaskan hatinya bahawa pendakwaan telah membuktikan kesnya di luar keraguan munasabah mengambilkira versi kejadian yang dikemukakan oleh tertuduh. Hakim juga gagal membangkitkan inferens-inferens bermanfaat

kepada tertuduh yang, *ipso facto*, memperkuatkan versi tertuduh serta membangkitkan keraguan munasabah bahawa tertuduh berniat untuk membunuh simati.

[Disabit atas kesalahan mematikan orang tidak sampai membunuh. Dihukum sepuluh tahun penjara.]

Case(s) referred to:
Mat v. PP [1963] 29 MLJ 263 ***(foll)***

Legislation referred to:
Penal Code, ss. 300, 302, 304(b)

Other source(s) referred to:
R Sharma, *Forensic Science In Criminal Investigation And Trials,* p 551

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Awang Armadajaya Awang Mahmud DPP

[Appeal from High Court, Seremban; Criminal Trial No: 45-2-2003]

Reported by Andrew Christopher Simon

JUDGMENT

KN Segara JCA:

[1] The appellant (accused) was convicted and sentenced to death by the Seremban High Court on 3 January 2007 for the offence of causing the death of one Mohamad Isnizar punishable under s. 302 of the Penal Code, by an act done with the intention of causing the death of the said Mohamad Isnizar, that is, for committing the offence of murder under s. 300 of the Penal Code.The cause of death was a stab wound inflicted by a sharp weapon.

[2] At the conclusion of the hearing of this appeal before us, we were unanimous that the appeal should be allowed and the conviction and sentence for murder by the High Court be set aside and, substituted therefore, a conviction for the offence of culpable homicide not amounting to murder, punishable under s. 304 Penal Code. The accused was sentenced to ten years imprisonment from the date of arrest.

[3] Upon a careful scrutiny of the record of appeal, we find that the conviction for murder is unsafe, as the learned trial judge failed to evaluate, judiciously, the accused's defence on oath that he had no intention to kill the deceased at any time.

[4] The accused, the deceased and the main prosecution witnesses were all prison officers. The accused was nick-named "kucing" and the deceased is also known as "tinju".

[5] The scene of the incident was the motor-cycle parking lot at the ground floor of the bachelors' barracks of the Seremban Prison. The accused and the deceased were room-mates, sharing room No. 2 on the 3rd floor of the said bachelors' barracks. Johaniza bin Atin (SP4), on whose evidence the prosecution's case primarily hinges, is also a prison warder living in the same bachelors' barracks, occupying room No. 1 on the 1st floor.

[6] The case for the prosecution is as follows:

[7] On 12 July 2002, at about 7pm, SP4 was about to take his shower when the accused came to his room in an angry mood. SP4 noticed some injuries and blood on the accused's hand. Upon SP4 inquiring how he had sustained the injuries, the accused said he was riding his motor cycle fast and had fallen off the motor cycle when it skidded.

[8] The accused repeatedly said, "aku tak puas hati". SP4 alleged that the accused said he wanted to stab Isnizar.He further alleged that the accused took a fruit knife in his room and cut his (accused's) own arm and stomach and uttered, "aku nak bunuh tinju. Kalau tak dapat bunuh dia aku akan bunuh ahli keluarganya" and, the accused was further alleged to have said, "hari ini hari lahir aku … aku nak bunuh orang."

[9] SP4 tried to calm the accused and took away the fruit knife from him and kept it away. SP4 testified that the accused then heard the sound of the engine of the deceased's motorcycle. SP4 alleged that the accused, thereupon, ran up to his room on the 3rd floor and returned to SP4's room armed with a knife and said, "kau tengok ini aku nak bunuh dia". SP4, who was then only wrapped in a towel, put on his pants and pursued the accused. While running down the stairs, pursuing the accused, SP4 called out to the deceased to flee, as the accused had gone to the parking area for motor cycles, to confront the deceased.

[10] When SP4 arrived at the scene, he saw the accused still holding on to the knife. The deceased's shirt was covered with blood. SP4 said it looked as if the accused wanted to stab the deceased again, and SP4 shouted at the accused. The accused gave him a look as if he wanted to stab him, as well. SP4 managed to avoid an attack on him and pulled the accused away to the back. However, the accused still held on to the deceased. (Saya sempat elak dan tariknya ke belakang. Dia masih lagi tak melepaskan tinju) SP4 seized the knife from the accused and sustained a slight injury to his hand.

[11] When SP4 seized the knife from the accused, the deceased and the accused were in a standing position with the deceased embracing the accused and inquiring, "kenapa kau tikam aku kucing"

> Semasa saya rampas pisau dari kucing, tinju sempat tanya "kenapa kau tikam aku kucing …
>
> Semasa tinju tanya "kenapa kau tikam aku kucing", itu dia masih lagi dalam keadaan berdiri dan memeluk kucing.

[12] SP4 testified that after he seized the knife from the accused, he threw it away on the grass near the drain, besides the barracks. When SP4 returned to the accused and the deceased, after throwing the knife, he found the deceased lying on the floor, and the accused standing near the head of the deceased uttering, "oh, kau tak mati lagi ya?" SP4 immediately held the accused and pulled him out of the barracks, and handed him to Kpl Zulkifli b. Saharudin (SP6), who had just arrived at the scene from the married officers' barracks, upon hearing a commotion at the bachelors' barracks. SP6 saw SP4 struggling to hold the accused. SP4 informed SP6 that the accused had stabbed the deceased. SP4 told SP6, "tolong pegang kucing ni, dia tikam tinju" and then went back to the deceased. While SP6 kept guard over the accused, Sgt Yunos (SP7) arrived. The deceased was then sent to the hospital, where he subsequently passed away.

> Saya campakkan pisau ke tepi berek iaitu atas rumput tepi longkang …
>
> Setelah saya buang pisau, saya pergi semula kepada kucing dan tinju. Saya dapati tinju dah rebah ke lantai. Kucing berdiri di kepala tinju sambil berkata "oh, kau tak mati lagi ya?" saya terus pegang kucing dan tarik dia keluar berek.

A …

Semasa saya bawa kucing keluar, Kpl Zul sampai dan cakap kepada dia "tolong pegang kucing ni, dia tikam tinju. (Kpl Zulkifli b Saharudin dicamkan)

B Saya pergi semula kepada tinju dan ada dua tiga orang datang. Saya buka helmet tinju. Pada masa itu tinju dalam keadaan menggigil dan mulutnya berbueh …

[13] The post-mortem on the deceased was carried out by Dr. Safoorah (SP3). Her oral evidence and her post-mortem report C (P10) clearly established the cause of death to be a stab wound on the chest of the deceased. The wound was on the left side of the chest, 132 cm from the heel and 9.0 cm from the midline measuring 5.6 x 2.4cm and 6.0cm deep. This wound was directed downwards and to the right, showing 1.1 cm tailing upwards, his D wound revealing a blunt lower edge and a sharp upper edge. It is significant to note, that under cross-examination, SP3 testified that the marks of trauma indicated that at the time the stab wound was inflicted the weapon was in a reverse position (Marks of trauma – semasa tikaman dilakukan keadaan senjata dalam keadaan E terbalik). The reverse position of the knife at the moment of the injury, and the direction of the wound, could give rise to several inferences favourable to the accused, in the context of the accused's version of the incident, particularly as to his credibility and probability that the fatal injury was inflicted unintentionally F and unknown to the accused, in the course of a struggle by the accused to retrieve the knife taken away by the deceased from its tucked position, behind the accused's back.

[14] The essence of the accused's defence was that he did not G intentionally inflict the fatal stab wound, and had no intention to kill the deceased, at any time.

[15] The accused's version of the incident is as follows:

[16] On 12 July 2002, at about 6.30pm, the accused was in H SP4's room. When he was about to return to his own room, SP4 requested him to buy cough syrup. SP4 often requested him to buy cough syrup as SP4 is addicted to it. In appreciation of the accused carrying out the request, SP4 gave him RM5. That day, SP4 handed to him RM15 to go and buy for him the cough syrup. I He left for Ampangan to buy the cough syrup for SP4. On his way back, after the purchase of the cough syrup, he fell off his motor cycle at a bend, because there was an oil patch on the road.

[17] That day (12 July 2002) was his birthday. Upon his return after the purchase of the cough syrup, SP4 offered him a can of beer (Carlsberg) telling him "hari ini hari jadi engkau, kita celebrate sama-sama" Initially, the accused refused as he had never taken any alcoholic drinks before this date. However, he was persuaded into drinking the can of beer when SP4 told him that he would not share a big secret concerning the accused, unless he drank the can of beer.

> Dia beritahu saya bahawa dia ada satu rahsia besar tentang diri saya. Dia tak hendak cerita rahsia itu kepada saya selagi saya tak minum air tersebut.
>
> Sebelum tarikh ini saya tak pernah minum arak atau beer.
>
> Johan cabar saya jika saya anak jantan saya kena minum. Jika saya hendak tahu rahsia tersebut saya kena minum.
>
> Saya minum minuman tersebut. Kemudian dia beritahu saya rahsia itu.

[18] After the accused had drunk the beer, SP4 told him the secret, that is, he had heard that the deceased had "sodomized" him. (Johan kata dalam gelak "aku dengar tinju main buntut kau, betul ke?") The accused was shocked and denied it. (Saya terperanjat. Saya tanya dia mana dia dapat cerita ini. … Saya nafikan kepada Johan bahawa tinju main buntut saya.)

[19] SP4 then instigated the accused to teach the deceased a lesson by saying, "kau jumpa tinju dan hentak dia". However, the accused was afraid, as the deceased was bigger built than him and was a Malaysian boxer.

[20] SP4 then suggested to the accused that he confront the deceased with a Rambo knife so that it would look real. SP4 and the accused then went up to the accused's room. SP4 knocked on the door. He then kicked open the door. The deceased was not in the room. SP4 entered the room and brought out a Rambo knife. He persuaded or prevailed upon the accused to go down to the motor cycle parking lot and wait for the deceased. When they reached downstairs, SP4 handed the Rambo knife to the accused, while SP4 went to register for duty. The accused tucked the knife, handed to him by SP4, behind the accused's back, at his waist.

[21] While the accused was at the stairs, the deceased returned on his motor cycle. At that time, SP4 was not with the accused. The deceased proceeded to park his motor cycle. The accused went towards the deceased and scolded him. When the accused was about 3-4 feet from the deceased, he was still furious and scolding the deceased. The deceased, too, was furious and both of them quarrelled. The accused saw the deceased giving a side-long look at a rotan lying on the ground. The accused perceived that the deceased was eyeing the rotan to use it against him, in the ensuing quarrel. The accused, instinctively, quickly took away the rotan and, the deceased pounced on him. The accused felt the knife tucked at his waist being removed. He then saw the knife being held by the deceased. He was shocked. (Semasa saya nampak pisau ditangan tinju saya terkejut – keadaan kami rapat) The accused then snatched the knife from the deceased. The accused suddenly felt someone pulling him away from behind and snatching the knife from his hand. He realized it was SP4 who had pulled him from behind and relieved him of the knife from his hand. The accused was not sure whether he had stabbed the deceased after he had retrieved the knife from the deceased.

[22] The accused testified he had no intention to kill the deceased. His intention to confront the deceased was only to get him to explain why he had defamed him. The accused denied SP4's version that he had declared to SP4 that he wanted to stab the deceased.

> Saya tidak berniat untuk membunuh tinju. Niat saya berdepan dengan tinju hanyalah saya hendakkan jawap kenapa dia memburuk-burukkan saya. …
>
> Pada tarikh 12.7.02 saya tidak ada menjerit-jerit menerkam dan hendak menikam tinju.

[23] Now, the two versions of the incident before the court at the conclusion of the trial, were:

1) the prosecution's version that the accused had declared to SP4 he wanted to kill the deceased and soon, thereafter, executed his intention by confronting him with a Rambo knife and stabbing him at the parking lot, without any quarrel having occurred between them;

and,

2) the defence's version that he had no intention to kill the deceased but had merely wanted to confront the deceased at the suggestion of SP4, so that he would stop defaming him;

it is incumbent and elementary for the trial judge to give adequate judicial appreciation of the defence version to determine whether the defence has cast a reasonable doubt on the prosecution's case. The burden on the prosecution to prove its case beyond reasonable doubt at the conclusion of the trial, notwithstanding a *prima facie* case having been established at the close of the case for the prosecution, never shifts to the defence to establish innocence. In this regard, the illuminating guidelines by Suffian J, set out in *Mat v. P*P [1963] 29 MLJ 263, should always be adhered to by a trial court when considering an accused's defence to any charge proffered. A bare killing without proof of intention or knowledge to cause death can never be murder, punishable under s. 302 Penal Code.

[24] We are of the view that the trial judge has not given adequate judicial appreciation and proper evaluation of the defence in stating that the defence had failed to raise any reasonable doubt, without assigning any valid reasons. We are of the view the trial judge has misdirected himself in not adequately analyzing all of the evidence before him, at the close of the case for the defence. The learned trial judge relied heavily on highly prejudicial and incriminating evidence of SP4 with regard to what the accused was alleged to have said to him in his room, particularly, the following:

(i) aku tak puas hati – aku tak puas hati dengan Isnizar;

(ii) aku nak bunuh tinju, kalau tak dapat bunuh dia aku akan bunuh ahli keluarganya;

(iii) hari ini hari lahir aku … aku nak bunuh orang;

(iv) kau tengok ini aku nak bunuh dia;

and at the scene

(i) oh kau tak mati lagi ya?;

without taking into consideration adequately the following factors:

A (a) that there was no third person in SP4's room – that is, there is no corroboration of what the accused was alleged to have said to SP4 in his room;

(b) that SP4's version had been challenged by the defence (in
B cross-examination);

Put: Niat awak dan OKT berjumpa tinju dikawasan parking motosikal adalah hanya untuk beri amaran kepada tinju sahaja.

C Jawapan: Tidak

Put: Awak tak nampak tikaman ke atas tinju.

Jawapan: Betul

Put: Tikaman berlaku semasa pergelutan

D Jawapan: Tidak

Put: Keterangan kamu bahawa OKT kata dia nak tikam tinju adalah tidak benar

Jawapan: Tak setuju.

E …

…

Put: Tidak benar OKT ada cakap kalau tak dapat tinju dia akan bunuh keluarganya.

F Jawapan: Benar.

…

…

Put: Selepas mendapati tinju tertikam OKT telah berikan
G kamu pisau Rambo.

Jawapan: Tidak

(c) that the accused had said in his defence that he did not say those words as alleged by SP4;

H

Pada tarikh 12.7.02 saya tidak ada menjerit-jerit menerkam dan hendak menikam tinju

(d) that SP4 had induced the accused to take a can of beer in his room shortly before the incident;

I

(e) that the blood sample of the accused contained 54 milligrams of ethyl alcohol per 100 milliliters (ie, 0.054% wt/vol) according to the chemist report (D45) of SP13;

(f) that when accused met SP4 the first time on 12 July 2002 he was normal but when he met him the second time at about 7pm the accused was drunk;

> Pada 12.7.02 OKT jumpa saya sebanyak 2 kali.Pertama pada masa saya sampai di berek bujang lebih kurang 7.00 petang.
>
> ...
>
> Put: Dalam pertemuan pertama keadaan OKT adalah normal
>
> Jawapan: Ya
>
> Pertemuan kedua berlaku pada jam 7.00 petang hari yang sama. Apabila saya jumpa OKT pada kali keduanya adalah mabuk. Saya tak pasti sama ada dia mabuk disebabkan dia telah minum beer dan samsu.

[25] A person is said to suffer from alcohol intoxication when the quantity of alcohol the person consumes exceeds the individual's tolerance for alcohol and produces behavioral or physical abnormalities. In other words, the person's mental and physical abilities are impaired. The effects of alcohol vary widely from person to person. Several factors can account for obvious differences in how certain amounts of alcohol can affect one person more than another. These factors also affect the particular signs and symptoms the person may have to indicate alcohol intoxication. Major factors that account for this variation in signs and symptoms include: prior experience with alcohol, taking drugs and medical conditions.

[26] In *Field's Expert Evidence: Medical and Non Medical*, 3rd edition, the learned author has broadly summarized the effects of blood alcohol level and has pointed out that there will be no intoxication if the blood alcohol level is below 0.05 per cent. The blood sample of the accused indicated blood alcohol level at 0.054%, despite putrefaction. It is to be noted that the accused's blood sample was taken about five hours after the incident, by which time the effect of metabolism could have converted some of the alcohol, and its presence in the blood eliminated. R. Sharma, in *Forensic Science In Criminal Investigation And Trials*, at p. 551, states:

A Immediately after absorption, the system starts elimination of alcohol. Most of it (about 90%) is metabolized by the system (kidneys). The rest is eliminated by the lung, sweat pores and through urine.

The rate of elimination varies with …

B

However, the commonly accepted rate of elimination is about 10 milliliters of absolute alcohol per hour. In terms of whisky, a large peg will be eliminated in about three hours.

C (g) that neither SP4 nor any other witness saw the accused stab the deceased, ie, inflict the fatal injury, intentionally or otherwise.

[27] The learned trial judge failed to carefully analyze the prosecution's evidence critically upon the conclusion of the case D for the defence, particularly, the evidence of SP4, to satisfy himself that the prosecution has proved its case beyond reasonable doubt for an offence under s. 302 Penal Code, in the light of the accused's version of the incident. The learned trial judge further failed to draw inferences favourable to the accused which, *ipso* E *facto,* lent credibility to the accused's version and, cast serious doubt that the accused intended to kill the deceased. This is especially so with regard to the accused's evidence that the deceased had removed the knife tucked at his back, between his waist and belt, and a struggle ensued between both of them. An F inference that the fatal injury to the deceased could have been inflicted unintentionally during this struggle to repossess the knife, was clearly staring in the eyes of the court, as neither SP4 nor any of the other prosecution witnesses saw the accused stab the deceased, and yet, the learned trial judge has not alluded to this G inference anywhere in his judgment.

[28] In the above circumstances, we are unanimous the learned trial judge has misdirected himself in the judicial appreciation of the defence case. We find the conviction for the offence of murder is H unsafe. We accordingly, allow this appeal, set aside the conviction and sentence of the High Court and substitute, therefore, a conviction for the offence of culpable homicide not amounting to murder, punishable under s. 304(b) of the Penal Code. The accused is sentenced to ten years imprisonment from the date of I his arrest.